

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1366

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
LAWRENCE MORICI,
Defendant-Appellant.

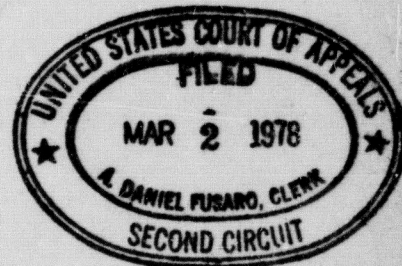
Docket No. 77-1366

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARTIN ERDMANN,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.



UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
LAWRENCE MORICI,
Defendant-Appellant.

REPLY BRIEF FOR APPELLANT

At trial, as on appeal, the Government's position was that the transfer of an object "not entirely innocent" satisfies the mens rea and knowledge requirements of the National Firearms Act, regardless of whether appellant knew that the instruments

*

involved ~~these~~^{were} firearms, i.e., capable of firing a shot (692-694; Government's Brief at 14, 19-22). The district court adopted this position, stating:

It is not an entirely innocent weapon, tear gas guns.

(695).

Indeed, this ruling was the premise for the judge's decision to take judicial notice that the Administrative Code of New York City requires a permit for tear gas guns and that ammunition for such guns may be obtained only by police officers (696).

On summation and on rebuttal summation (804), the prosecutor argued that appellant's knowledge was irrelevant, so long as the weapons could, in fact, fire a shot:

What does it mean [that the barrels of the pen guns were different]? You know from Agent Erickson that they will fire a regular .22 shot. You also know from Mr. Gorman that they are probably going to fire a cartridge....

*Numerals in parentheses refer to pages of the trial transcript.

In the district court, the Government asserted that the Supreme Court's decision in United States v. Freed, 401 U.S. 601 (1971), supported its position:

Under United States versus Freed dealing with the scientia [sic] requirements and as I understand the proposed charge with which the Government disagrees were totally [sic] submitted by Mr. Morici, under Freed if it is not entirely innocent the Court may find there is a mens rea and we would say if you are dealing with an illegal instrumentality, even if what Morici says, the scientia requirement is fully met.

(694. Emphasis added).

His Honor will tell you about this. Listen to him when he tells you about that. What if Mr. Morici did have the smaller barrels but you know the barrels really will fire a .22, how does that affect him as a matter of law?

(760).

The district court rejected appellant's requested instruction that the jurors be required to find that appellant knew the pen guns were capable of firing a shot at the time he transferred them.* Judge Werker did instruct the jurors that appellant had to join the conspiracy with knowledge of at least some of its unlawful purposes (824-825). However, under that instruction and the judge's original charge on the elements of the crime (820), the jurors were impermissibly permitted to convict if they found that the unlawful purpose was to sell tear gas guns without complying with federal transfer and tax requirements, so long as those guns were subsequently shown to be capable of firing a bullet, whether or not appellant then knew of that fact (see Appellant's Brief at 19-21).

Moreover, other portions of the charge permitted the jurors to convict if they merely found a conspiracy to commit a violation of the New York City Administrative Code. The judge stated:

*The Government's claim that the district judge correctly rejected the requested instruction because it mentioned the caliber of the bullet fired from the device (Government's Brief at 18) is frivolous. The charge submitted was obviously an attempt to apply the facts of the case to the law. The Government's own proof indicated that the pen guns given to Raffa had been test-fired with .22 caliber bullets (307, 317).

... [Y]ou do not have to find before you may consider a particular defendant a member of the conspiracy that he knew that the basic purposes and objectives of the conspiracy constituted a violation of federal law....

(825).

Combined with the proof of the illegal nature of tear gas guns under local ordinance and the Assistant U.S. Attorney's prior argument, this charge erroneously allowed the jurors to find appellant guilty even if they believed that he did not know that the objects transferred could fire a shot. See United States v. Rosenblatt, 554 F.2d 36, 38 (2d Cir. 1977); United States v. Gallishaw, 428 F.2d 760, 763 (2d Cir. 1970); United States v. Howell, 447 F.2d 1114, 1117 (2d Cir. 1971). Indeed, by defining a firearm in connection with Count Two* as a device from which a shot could be discharged, without informing the jurors that, to convict, appellant had to have knowledge of the object's capability, the district court only compounded the problem, since there had been proof that a weapon similar to that transferred by appellant had, in fact, fired a bullet. Thus, when viewed as a whole, the charge eliminated appellant's defense and impermissibly allowed the jurors to convict regardless of appellant's claim of knowledge.

*Appellant was not charged in this count.

CONCLUSION

For the foregoing reasons and the reasons set forth in appellant's main brief, the judgment of the district court should be reversed and the case remanded for a new trial.

Respectfully submitted,

MARTIN ERDMANN,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

March 2, 1978

